IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.510 of 2004

P.J.Nagulan .. Petitioner/Accused

vs.

S.Balchand .. Respondent/Complainant

Prayer:- This revision has been preferred against the judgment dated 01.12.2003 in C.A.No.55 of 2003 passed by the Sessions Judge, Nilgiris at Uthagamandalam, modifying the judgment made in C.C.No.74 of 2003 on the file of the Judicial Magistrate, Uthagamandalam, dated 13.07.2003.

For Petitioners :Mr.V.Parthiban

For Respondent :Mr.S.Pradeep

JUDGMENT

This revision has been preferred against the judgment in C.A.No.55 of 2003 on the file of the Sessions judge, Uthagamandalam, which has arisen out of the judgment in C.C.No.74 of 2003 on the file of the Judicial Magistrate, Udagamandalam.

2.The complainant/respondent herein has preferred a private complaint under Section 200 of Cr.P.C., against the accused for an offence under section 138 of the Negotiable Instruments Act, contending that to discharge a subsisting hand loan the accused had drawn a cheque for Rs.85,000/- in the name of the complainant on 15.9.2002 and when the same was presented for realization on 28.11.2002 at Central Bank of India, Udagamandalam Branch, the same was returned with an endorsement "finds insufficient". Immediately the complainant had issued notice to the accused informing that the cheque drawn by him under Ex.P.1 was dishonoured by the bank on presentation. In spite of the receipt of the notice under Ex.P.4 the accused has not chosen to send any reply nor made any arrangement to repay the loan amount.

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3.Afther taking cognizance of the offence, the learned Judicial Magistrate furnished copies under Section 207 of Cr.P.C., and when the offence was explained to the accused and questioned the accused pleaded not guilty. On the side of the complainant, the complainant has examined himself as P.W.1 and had exhibited Ex.P.1 to Ex.P.5.

4.The complainant as P.W.1, has narrated what he has stated in the complaint. According to P.W.1, Ex.P.1 is the impugned cheque for Rs.85,000/- drawn by the accused in favour of the complainant on 15.9.2002 and when the same was presented on 28.11.2002 in Central Bank for collection the same was returned for the reason "funds insufficient". Ex.P.2 is the memo issued by the Central Bank, Uthagamandalam. Ex.P.3 is the memo issued by the Indian Bank, Udagamandalam. Under the original of Ex.P.4 a notice was sent by the complainant to the accused informing about the dishonour of Ex.P.1-cheque. The said notice was received by the accused under Ex.P.5-acknowledgment on 3.12.2002, but the accused has not sent any reply.

5.When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., the accused would deny his complicity with the crime. But he has examined himself as D.W.1 and exhibited Ex.D.1 to Ex.D.3. After going through the evidence both oral and documentary, the learned trail Judge has come to the conclusion that the offence under Section 138 of the Negotiable Instruments Act has been proved beyond any reasonable doubt against the accused and accordingly convicted and sentenced the accused under Section 138 of the Negotiable Instruments Act to undergo RI for one year and also directed him to pay a compensation of Rs.85,000/- to the complainant. Aggrieved by the findings of the learned trial Judge, the accused preferred an appeal before the Sessions Judge, Nilgiris at Uthagamandalam, in C.A.No.55 of 2003, who after giving due deliberations to the submissions made by counsel on both sides and after going through the evidence on records, modified the sentence alone to that of two months RI instead of one year RI and confirmed the fine imposed by the trial Court, which necessitated the accused to prefer this revision before this Court.

6.It is reported by both the learned counsel on either side that the settlement talk could not be fructified.

7.Now the point for determination in this revision is whether the conviction and sentence imposed on the accused under Section 138 of the Negotiable Instruments Act by the learned first appellate judge is sustainable for the reasons stated in the memorandum of revision?

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8.The Point:-

8(a) The learned counsel appearing for the revision petitioner wound contend that the accused had borrowed a hand loan of Rs.40,000/- in the year 1996 from the complainant and that he had already discharged the said loan under Ex.D.1, entries made by the complainant, and that Ex.P.1-cheque was handed over by the accused in the year 1996 along with other documents as a security for the loan of Rs.40,000/- borrowed by him from the complainant. But unfortunately the accused has not sent any reply notice taking such a defence in it. A perusal of Ex.P.1, impugned cheque will go to show that it is dated 15.9.2002. According to the learned counsel appearing for the revision petitioner, Ex.P.1-cheque was a blank cheque at the time when he handed over the same to the complainant in the year 1996 and the complainant had forged the same for the purpose of this case after filling up the amount and the name of the payee in Ex.P.1. But the accused has not taken any steps to refer Ex.P.1 to an handwriting expert to show that Ex.P.1 is a forged one. The accused has not denied his signature in Ex.P.1, on the other hand he would admit that Ex.P.1 contains his signature, but it was only a blank cheque he had drawn in the year 1996 and handed over the same to the complainant. Once the signature in Ex.P.1-cheque is admitted then the presumption under Section 139 of the Negotiable Instruments Act will follow. Section 139 of the Negotiable Instruments Act runs as follows:_

> "It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability."

8(b) According to P.W.1 only to discharge a subsisting liability of a hand loan on Rs.85,000/- in the year 2002 the accused had drawn Ex.P.1-Cheque in favour of the complainant. A vain attempt was made before the trial Court by producing two receipts which will go to show that during the year 1999 the complainant had asked the accused to meet him in person. In the cross-examination P.W.1 would fairly concede that the accused had borrowed loan from the complainant in the year 1999 also and in discharge of the said loan of Rs.25,000/- (Rs.5,000/- on 26.7.1999 and Rs.20,000/- on 24.8.1999) he has issued receipts which were drawn by him but those two receipts were not exhibited. Such a defence cannot also be raised by the accused without taking such a defence by way of reply notice to the notice issued by the complainant under the original of Ex.P.4, which was acknowledged under Ex.P.5. Under such circumstances, the conviction under Section1 38 of the Negotiable Instruments Act passed by the both the Courts below cannot be interfered with by this Court.

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8(c) But coming to the sentence part the learned Judicial Magistrate has sentenced the accused to undergo one year RI and directed the accused to pay a sum of Rs.85,000/- to the complainant under Section 357(3) of Cr.P.C., which was modified by the first appellate Court in C.A.No.55 of 2003 on the file of the Sessions Judge, Nilgiris at Uthagamandalam, as two months RI and the accused was directed to pay a sum of Rs.85,000/- towards compensation with default sentence. In this regard, the ratio decidendi in 2004(2) SCC 235 (Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza) is relevant to be referred to herein. In the above said case, the accused had drawn a chque in favour of the complainant for a sum of Rs.40,000/- and on presentation before the Bank the same was returned with an endorsement that the accused had instructed the bank to stop the payment. Both the Courts below concurrently held that the accused cannot under such circumstance be held liable under Section 138 of the Negotiable Instruments Act and accordingly acquitted the accused, which was challenged before the Honourable Apex Court in the above appeal. The Honourable Apex Court while disposing of the appeal as observed as follows:-

> "We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the NI Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.
>
> The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of

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the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

After observing in the above lines the Honourable Apex Court has given a month's time to the accused to pay a sum of Rs.80,000/- (twice the amount of the cheque) to the complainant with default sentence.

I am of the opinion that the same yardstick can be applied to the present facts of the case also. The learned counsel for the revision petitioner would contend that the complainant is a money lender and that the accuses is working as a salesman in the Avin Booth in Nilgiris. Under such circumstances, I am of the view that at least two months time is to be given tot he accused for the payment. Point is answered accordingly.

9. In fine, the criminal revision is dismissed and the judgment in C.A.No.55 of 2003 on the file of the Sessions Judge, Nilgiris at Uthagamandalam, is set aside and the accused is convicted under Section 138 of the Negotiable Instruments Act and two months time from this date is given to the appellant/accused to pay a sum of Rs.1,70,000/- (twice the amount of the cheque) to the complainant in default the accused shall suffer Simple Imprisonment for six months.

ssv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1.The Sessions Judge, Uthagamandalam.

2.The District and Sessions Judge,
Nilgiris at Uthagamandalam.

3.The Judicial Magistrate, Uthagamandalam.

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4.-do-The Chief Judicial Magistrate,
Uthagamandalam, Nilgiris.

+ 1 cc to Mr. G. Kumud Thabhak, Advocate SR No. 41064

VRK(CO)
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